Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RANDALL WARE, RICHARD KAUAHQUO, CAROL FRAME, WILLIAM TARTSAH AND WENDELL AUTAUBO, in Their Capacity as Commissioners of the Housing Authority of the Kiowa Tribe of Oklahoma, an Indian Housing Authority,

Petitioners,

v.

HOUSING AUTHORITY OF THE KIOWA TRIBE OF OKLAHOMA, an Indian Housing Authority, and ART UNAP, JR., DOROTHY PALMER AND SANDRA QUOETONE, in Their Capacity as Officers and Commissioners of the Housing Authority of the Kiowa Tribe of Oklahoma,

Respondents.

On Petition for a Writ of Certiorari to the Oklahoma Supreme Court

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an Oklahoma statute, enacted pursuant to the United States Housing Act of 1937, and intended to help in creation of Indian Housing Authorities, also creates jurisdiction in Oklahoma courts to rule upon a tribal political dispute and dictate the political processes a tribe must use to select members of the governing body of the tribe's Indian Housing Authority?

LIST OF PARTIES

Mr. Randall Ware, Mr. Richard Kauahquo, Ms. Carol Frame, Mr. William Tartsah and Mr. Wendell Autaubo, in their capacity as commissioners of the Housing Authority of the Kiowa Tribe of Oklahoma, an Indian Housing Authority formed and operated pursuant to the United States Housing Act of 1937,

Petitioners

Housing Authority of the Kiowa Tribe of Oklahoma, an Indian Housing Authority formed and operated pursuant to the United States Housing Act of 1937; Mr. Art Unap, Jr., Ms. Dorothy Palmer and Ms. Sandra Quoetone, all in their capacity as officers and commissioners of the Housing Authority of the Kiowa Tribe of Oklahoma,

Respondents

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

Petitioners, Mr. Randal Ware, Mr. Richard Kauahquo, Ms. Carol Frame, Mr. William Tartsah and Mr. Wendell Autaubo, acting in their capacity as commissioners of the Housing Authority of the Kiowa Tribe of Oklahoma, respectfully pray that a writ of certiorari issue to review the decree of the Supreme Court of Oklahoma entered on July18, 2000.

OPINION BELOW

The opinion of the Oklahoma Supreme Court is reported at _____ P.3d _____ (Okla. 2000). It is styled *Housing Authority of the Kiowa Tribe of Oklahoma v. Randall Ware, Supreme Court of Oklahoma, No. 93295*. The text of the opinion is reproduced in the Appendix, p. 1-10.

JURISDICTION

The opinion of the Oklahoma Supreme Court was entered July 18, 2000. The Court's jurisdiction to consider this petition from the final judgment or decree by the highest court of the state in which the decision could be had is invoked pursuant to 28 U.S.C. § 1257.

STATEMENT OF NOTIFICATION UNDER RULE 29.(4)(c) SUPREME COURT RULES

Petitioners state that 28 U.S.C. § 2403(b) may apply. This proceeding may draw into question the constitutionality of 63 O.S. § 1057, as applied in this case. Housing Authority of the Kiowa Tribe of Oklahoma may not be an "agency" of the State of Oklahoma within the intent and purpose of 28 U.S.C. § 2403(b).

A copy of this Petition for Writ of Certiorari will be served upon the Honorable Drew Edmondson, Attorney General, State of Oklahoma.

CONSTITUTION PROVISIONS

Article I, Section 8, Clause 3 of the United States Constitution:

> "The Congress shall have Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

Article VI of the United States Constitution:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be

made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . ."

24 Code of Federal Regulations § 905.108(b) (Repealed). Reproduced in Appendix, p. 15.

Title 63 O.S. § 1057. Reproduced in Appendix, p. 16.

STATEMENT OF THE CASE

INTRODUCTORY EXPLANATION

This petition challenges Oklahoma's exercise of judicial power to dictate the political processes that the Kiowa Tribe of Oklahoma ("Kiowa") must use to select members of the governing body of Housing Authority of the Kiowa Tribe of Oklahoma ("KHA").

KHA is an Indian Housing Authority originally operated under the United States Housing Act of 1937. Oklahoma courts exercise their judicial power on the theory that an Oklahoma statute has made Indian Housing Authorities "agencies" of the State, and that Oklahoma courts have "inherent" jurisdiction over Indian Housing Authorities, until Congress explicitly removes that jurisdiction.

Indian tribes operated Indian Housing Authorities under the United States Housing Act of 1937. The United States authorized tribes lacking an adequate tribal government to

organize Indian Housing Authorities under state statutes that made provisions for Indian Housing Authorities.

In 1965, in response to federal authorization, Oklahoma enacted its Indian Housing Authority Act, 63 O.S. § 1057. (Appendix, p. 16). That Oklahoma law specifically designated an Indian Housing Authority as ". . . an agency of the State of Oklahoma . . ." even though tribes were empowered to select the members of the governing bodies and funding came from the United States directly to tribes.

The blending of Federal, tribal and state sovereignty in Indian Housing Authorities in Oklahoma has yielded conflicting case law. The United States Court of Appeals for the Tenth Circuit and the Oklahoma Supreme Court have used different analytical approaches and reached opposite results. Essentially, the Tenth Circuit approach is designed to protect tribal sovereign power. The Oklahoma approach is designed to protect Oklahoma sovereign power, at the expense of the tribe.

The Tenth Circuit proceeds upon the principle that characterizations of Indian Housing Authorities as both a "state agency" and as a "tribal organization" are not mutually inconsistent. *Housing Authority of the Kaw Tribe v. City of Ponca City*, 952 F.2d 1183 (10th Cir. 1991). Thus, the Tenth Circuit examines the purpose of a statute or a regulation sought to be applied to an Indian Housing Authority. The Tenth Circuit then uses flexibility to decide whether, under the statute or regulation in question, Indian Housing Authorities must be deemed Indian "tribes" that

benefit from the privileges and immunities of an Indian tribe. *Duke v. Absentee Shawnee Tribe of Oklahoma Housing Authority*, 199 F.3d 1123 (10th Cir. 1999). Any ambiguity is construed in favor of the conclusion that the Indian Housing Authority is an Indian tribe. *Duke*, 199 F.3d at 1125. By this approach, the Tenth Circuit protects from infringement tribal sovereignty, tribal self-determination and tribal self-government.

On the other hand, the Oklahoma Supreme Court proceeds upon the theory that due to 63 O.S. § 1057 it has jurisdiction, at least to control the political process of selecting commissioners of an Indian Housing Authority and perhaps even over a "Housing Authority and its activities". *Housing Authority of Choctaw Nation v. Craytor*, 600 P.2d 314 (Okla. 1979). Consistent with *Craytor*, but independent of 63 O.S. § 1057, the Oklahoma Supreme Court also holds that Oklahoma has "inherent" jurisdiction which can be limited only if Congress explicitly withdraws state court power over Indian Housing Authorities. *Lewis v. Sac and Fox Tribe of Oklahoma Housing Authority*, 896 P.2d 503 (Okla. 1994), *cert. denied*, 516 U.S. 975, 116 S.Ct. 476, 133 L.Ed.2d 405 (1995) (state court ordered Indian Housing Authority to convey mineral interest to tribal member and to account and pay over profits the Housing Authority had realized from that mineral interest.) By this approach, the Oklahoma Supreme Court expands and protects Oklahoma sovereignty.

By applying 63 O.S. § 1057 along with an expansive view of inherent jurisdiction, Oklahoma courts are dictating

to Kiowa the tribal political process that must be used in selecting members of the governing body for KHA. By doing this, Oklahoma infringed upon Kiowa's inherent sovereign right to make its own laws in internal matters. *See*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). According to Oklahoma, Kiowa cannot adopt a tribal law to select a different political process to choose KHA commissioners.

The infringement is not limited to interference with Kiowa's right to designate its own political processes to select Indian Housing Authority commissioners. Because Oklahoma courts have chosen the proper tribal political process, Oklahoma courts have intruded upon a function properly left to the tribal forum for dispute resolution. This dispute should be resolved by boards created under the Kiowa Constitution and by Kiowa's tribal court -- a Code of Federal Regulations Court.

FACTS

Kiowa is a federally recognized Indian tribe. (61 Fed. Reg. 58, 211). KHA is an Indian Housing Authority that Kiowa authorized and ran under the United States Housing Act of 1937. (Tr., Def. Ex. 7).

The United States Housing Act of 1937 permitted tribes to run tribal housing programs. Not all Indian tribes, though, had a tribal governmental structure adequate to form an Indian Housing Authority under this Act. Because of this, such tribes were allowed to create an Indian Housing

Authority pursuant to state laws "which provide for establishment of IHA's with all necessary legal power to carry out low income housing projects for Indians." *See, e.g.*, 24 C.F.R. § 905.108(b) (C.F.R. 89). (repealed)

To accommodate tribes under the 1937 Act, in 1965, the Oklahoma Legislature amended the Oklahoma Housing Authority Act, 63 O.S. §1051, *et seq. See, Eaves v. State of Oklahoma*, 795 P.2d 1060, 1062-3 (Okla. Crim. App. 1990) (dissenting opinion, recognizing that the Oklahoma legislature acted in response to federal regulation). This new Oklahoma statute created a housing authority for each tribe in Oklahoma. Each tribe could choose to use that housing authority by enacting a tribal resolution declaring a need for a housing authority.

Generally, 63 O.S. § 1057 (Appendix, p. 16) provided a structure for governing these housing authorities, but left selection of members of the governing structure to tribal political action. The Oklahoma statute directed that these Indian Housing Authorities were to be governed by five commissioners. It left the actual selection of those commissioners to the ". . . Chief or other governing head. . ." of each tribe. Of particular significance to this case is that the Oklahoma statute declared that each Indian Housing Authority was ". . . an agency of the State of Oklahoma . . . ."

In 1969, Kiowa had only an interim tribal government. It was one of many tribes that lacked a tribal government adequate to form an Indian Housing Authority. Thus, Kiowa

enacted a tribal resolution that activated KHA pursuant to 63 O.S. §1057. (Tr., Def. Ex. 7-9).

Virtually from the inception, Kiowa experienced intra-tribal controversy concerning the proper tribal political mechanism to select KHA commissioners. In some instances, they were selected by popular vote of the entire tribe -- a body called the Kiowa Indian Council. Some tribal members viewed the Kiowa Indian Council as the "governing head" of the tribe. In other instances, commissioners were appointed by the Chairman of the Kiowa Business Committee -- a tribal constitutional body that has been delegated both executive and legislative powers. Some tribal members viewed the Chairman of the Kiowa Business Committee as the ". . . Chief or other governing head. . ." of the tribe. (Tr. 23-30; 43-47).

Eventually, KHA's five member board of commissioners shrank to three people, the Respondents, Mr. Art Unap, Jr., Ms. Dorothy Palmer and Ms. Sandra Quoetone ("Respondents"). Currently, the terms of each of the Respondents have long since expired by passage of time. (Tr. Def. Ex. 4, p. 2). For example, Mr. Unap, Jr. testified that he has served 12 years, but he was only elected for 2 terms, of 1 to 3 years each. His term expired but he was never replaced and so he was able to keep his office indefinitely. (Tr. 31-32.)

These Respondent hold-over commissioners had not been replaced because there had been no tribal election for new KHA commissioners. There had been no election

because KHA, under the direction of the hold-over commissioners, refused to pay to the tribe the funds necessary to place an election of KHA commissioners on a tribal election ballot. (Tr. 30-32; 49-52; Def. Ex. 3).

This tribal "deadlock" over the selection of KHA commissioners produced more controversy in 1996, after Congress enacted the Native American Housing Assistance and Self-Determination Act, 25 U.S.C. §4101, *et seq.* ("NAHASDA") to replace tribal housing programs conducted under the United States Housing Act of 1937.

The Kiowa Business Committee, acting as a constitutionally created tribal body, took tribal political action to start a tribal housing program under NAHASDA. The Kiowa Business Committee's action caused a political dispute with Respondents. This dispute culminated in a lawsuit filed by KHA and its hold-over commissioners against the members of the Kiowa Business Committee. *Housing Authority of the Kiowa Tribe of Oklahoma v. Billy Evan Horse, et al.*, No. CIV-97-A52, Court of Indian Offenses for the Kiowa Tribe, Anadarko, Oklahoma. In this lawsuit, KHA denominated itself a "state agency" and attacked the validity of the Kiowa Business Committee's action under NAHASDA.

To address disputes from the KHA hold-over commissioners and to provide KHA with a full five member board, with terms that were unexpired, the Chairman of the Kiowa Business Committee, acting under tribal law,

appointed Petitioners as the new KHA commissioners. (Tr., Def. Ex.5).

Respondent hold-over commissioners refused to recognize Petitioners as the new legally appointed KHA commissioners and refused to yield their office to them. Respondent hold-over commissioners retained actual physical control of KHA. They asserted that under the Oklahoma statute, 63 O.S. §1057, KHA was an Oklahoma state agency, and that they were state officials. They asserted that because KHA was a state agency, Oklahoma law dictated the tribal political process of selecting commissioners. Respondents claimed that Oklahoma law required that their positions be filled by popular election by the tribe as a whole. They also claimed that KHA could not be required to use its own funds to pay for such an election. As a result, Respondents claimed, under Oklahoma law, they legally remained in office, expired terms or not, until they were replaced by the tribal election. (R. 85-143).

Respondents drew support from Oklahoma Supreme Court case law. In *Housing Authority of Choctaw Nation v. Craytor*, 600 P.2d 314 (Okla. 1979), the Oklahoma Supreme Court examined another tribe's housing authority formed pursuant to 63 O.S. § 1057. It concluded that the tribe's political process of selecting commissioners was controlled by state law, not tribal law. Hence, a tribal political dispute over that selection process was subject to state court jurisdiction. The Oklahoma Supreme Court's apparent rationale was that 63 O.S. § 1057 converted the dispute into a "Housing Authority" matter that was controlled by

Oklahoma law. Such a dispute was not an "intra-tribal matter" that was beyond Oklahoma law.

Respondent hold-over commissioners challenged the action of the Kiowa Business Committee in appointing Petitioners to replace them as new KHA commissioners. Theys sued Petitioners in Oklahoma state courts seeking a state court declaration that Respondents were legally commissioners of KHA. Likely, Respondents selected the state forum to benefit from *Craytor* and because a federal forum was unavailable. *See*, *Ware v. Richardson*, 347 F.Supp. 344 (W.D. Okla. 1972) (a dispute between Kiowa tribal members and KHA, including a dispute over the proper political mechanism for selecting KHA commissioners, was "intra-tribal" and beyond federal court jurisdiction).

In Respondents' state court suit, *Housing Authority of the Kiowa Tribe of Oklahoma v. Ware*, No. CJ-98-118, District Court of Caddo County, Respondents denominated KHA "an agency of the State of Oklahoma" and claimed state court jurisdiction under *Craytor*. Respondents alleged that state law, 63 O.S. §1057, controlled the tribal political process for selecting KHA commissioners. They asserted that Oklahoma law applied to the Kiowa Tribe and required it to conduct a popular election to replace them. (R. 1-52; 85-143).

Petitioners answered and counterclaimed. (Appendix 17-19). They alleged that Respondents' terms of office had expired, and that under tribal law Petitioners were the new, properly appointed commissioners. (R. 53-58).

In deference to *Craytor*, Petitioners alleged that even if Oklahoma law controlled, that law upheld the propriety of the Kiowa tribal political process used to appoint them. (R. 144-159).

Petitioners also alleged that Respondents' claim of right to their offices under state law and their state court suit to enforce that right was a significant interference with Kiowa's right to self-government. (R. 53-58). Petitioners also asserted that the state court lacked subject matter jurisdiction because there was neither tribal nor Congressional consent to suit. (R. 78-84). (Appendix 20-21). At trial, Petitioners renewed their challenge to state court jurisdiction by oral motion, which was overruled from the bench. (Appendix 22-24).

The District Court of Caddo County found that it had jurisdiction under *Craytor*. It then construed the Kiowa Constitution and placed the tribal political power to select commissioners in the entire body of the tribe, and not in the Chairman of the Kiowa Business Committee. (Appendix 11-14). Hence, the District Court of Caddo County voided political action taken under tribal law and ruled that state law required Respondents be replaced only through a Kiowa general tribal election. (R. 287-289). The state court order is reproduced in the Appendix at p. 11-14.

Petitioners appealed to the Oklahoma Supreme Court. Again, Petitioners asserted that they were properly appointed under tribal law. Nonetheless, in deference to *Craytor*, Petitioners argued that even if Oklahoma law applied, they were still properly appointed to office. This was so, they urged, because Oklahoma law, properly interpreted and applied to Kiowa's tribal political structure, should yield a result consistent with tribal law.

But, Petitioners further argued, if applying Oklahoma law invalidated their appointments as the new KHA commissioners – appointments legal under tribal law -- then the Oklahoma law was an impermissible infringement upon tribal self-determination and tribal self-government. *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed..2d 251 (1959). (Appendix, p. 25).

Further, Petitioners argued that KHA was an integral part of Kiowa, a federally recognized Indian tribe. As duly appointed political officers of a tribal sovereign, who were asserting the right to the political offices of the tribal sovereign, Petitioners enjoyed tribal sovereign's immunity to suit. *See, e.g., Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed.2d 1628 (1949). Because of this immunity to unconsented suit, Oklahoma courts had no subject matter jurisdiction unless there was either Congressional or tribal consent to suit. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies,*

Inc., 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).[1]

Respondent hold-over commissioners filed no brief in the Oklahoma Supreme Court. The Oklahoma Supreme Court decided the case in the absence of any response from them, because it was a "case . . . of a public nature."

The Oklahoma Supreme Court concluded that its decision in *Craytor* established that state courts had jurisdiction over disputes concerning a tribe's political process in selecting the commissioners of its Indian Housing Authority. The issue was viewed as a question of state law. The Oklahoma Supreme Court plainly indorsed the *Craytor* concept that a tribal dispute over the political mechanism of selecting the members of the governing body of the tribe's Indian Housing Authority was not "intra-tribal". Rather it was within state judicial power.

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[1] In 1998, this Court established in *Manufacturing Technologies* that Kiowa's tribal immunity to suit was a matter of federal law, not subject to diminution by Oklahoma courts. In this case, though, the Oklahoma Supreme Court avoided the *Manufacturing Technology* holding by concluding: (1) that it was deciding a question of "state law" by interpreting a state statute and (2) it was individual tribal members, instead of the tribe, that were sued.

Next, the Oklahoma Supreme Court analyzed Kiowa governmental structure and Kiowa law to determine where state law had placed power for selecting KHA commissioners. The Oklahoma Supreme Court chose a tribal election, rather than appointment by the Kiowa Business Committee Chairman. As a result, the Oklahoma court used state law to void the tribal political action that appointed Petitioners as the new KHA commissioners.

REASONS FOR GRANTING THE WRIT

OKLAHOMA CANNOT USE STATE LAW TO DICTATE TRIBAL POLITICAL PROCESSES BECAUSE IT CREATES A PROFOUND INFRINGEMENT UPON TRIBAL SELF-GOVERNMENT THAT DIRECTLY VIOLATES THIS COURT'S DECISIONS.

Kiowa must be free of dictates of Oklahoma law when engaging in the political process of selecting commissioners to govern its tribal Indian Housing Authority. This is so because of Kiowa's inherent sovereign rights and because of Congress' policy of promoting tribal self-determination and self-government. The inherent sovereignty of Kiowa, and Congress' policy of promoting tribal self-government make no allowance for Oklahoma to infringe so deeply in such basic matters of tribal self-government. There is no "state law" issue here.

Kiowa is a domestic dependent nation, which is a direct continuation of one of the "self-governing political communities that were formed long before Europeans first settled in North America." *Cherokee Nation v. Georgia*, 30 U.S. 1, 8 L.Ed. 25 (1831); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). As a domestic dependent nation, Kiowa has the inherent power to make its own substantive law in internal matters and to enforce that law in its own forum. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978).

The United States recognizes Kiowa as a domestic dependent sovereign and maintains a government-to-government relationship with Kiowa. 25 C.F.R. §83.2. Under the Constitution, Indian relations are the "exclusive province of federal law." *Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 105 S.Ct. 1245, 1251, 84 L.Ed.2d 169 (1985). Congress, through exercise of its power under the Indian Commerce Clause, is the sole source of this nation's policy for Indian affairs. *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). In the area of Indian affairs, states are divested of virtually all authority. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).

Congress, as the source of this nation's policy for Indian affairs, has created and implemented a policy of promoting tribal self-determination. *See, e.g.,* 25 U.S.C. §450(a). Pursuant to this policy, Congress supports and

assists Indian tribes in developing strong and stable tribal governments that can operate quality programs and economies within tribal communities. 25 U.S.C. § 450(b). In support of this effort, this Court has emphasized that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 1087, 1092, 94 L.Ed.2d 244 (1987). States have no power to infringe upon tribal self-government. *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

Plainly, this federal policy of developing and protecting tribal governments must limit the reach of state governments. This limit is necessary because the exercise of state sovereign power cannot be allowed to crush tribal sovereigns. For this reason, instances in which tribes may be subjected to state law or regulation are limited to situations where state laws or regulations are not preempted by Congress, and do not infringe upon tribal self-government. *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991).

As an ultimate protection of tribal sovereignty, Congress, and this Court, provide that tribes are not subject to the power of state courts unless either the tribe or Congress create state court power by a consent to suit. *See, e.g.*, 25 U.S.C. § 1451, *et seq.*, 25 U.S.C. § 450n(1); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 111 S.Ct. 905, 112

L.Ed.2d 1112 (1991). (Recognizing tribal obligation to collect state taxes on certain tobacco sales, but holding tribe immune to suit by state for failure to collect those taxes.)

Federal Indian housing programs are an important part of Congress' policy of development strong tribal governments that can operate quality programs. Congress intends that its Indian housing programs will function as a part of an Indian tribe's governing activity. Originally, Indian Housing Authorities were created pursuant to the United States Housing Act of 1937. Indian Housing Authorities were then envisioned as entities intended to receive federal funds and to work with federal, tribal and community organizations to provide better housing. *See, e.g.*, 24 CFR § 905.101 *et seq.* (1988).

NAHASDA replaced the United States Housing Act of 1937 programs that related to Indian tribes and developed more fully Congress' policy of promoting Indian self-determination. To provide continuity in Indian housing programs, Congress required in NAHASDA that newly authorized "tribally designated housing entities" take steps to "protect and maintain" housing developed under the 1937 Act. Thus, Indian housing programs, including those started under the 1937 Act, now proceed upon Congress' strong emphasis on tribal self-determination and self-government in NAHASDA.

In NAHASDA, Congress emphasized the importance of tribal housing programs as part of its policy of promoting Indian self-determination and tribal self-government.

Congress specifically said that the United States should recognize ". . . the right of Indian self-determination and self-government by making . . . assistance available directly to Indian tribes or tribally designated entities . . . ." 25 U.S.C. § 4101(7).

Congress also used NAHASDA to touch upon the proper role of state governments concerning tribal housing programs. It explained that it wished to encourage ". . . effective partnerships among the Federal Government, State, tribal and local governments . . . ." 25 U.S.C. § 4101(1)(C).

Key to understanding the nature of Congress' policy is that Congress described the intended relationship among the various sovereigns as "partnerships." Inherently, "partnerships" are relationships arising from agreement. *St. Clair Lime Co. v. Ada Lime Co.*, 162 P.2d 547 (Okla. 1945) (partnerships arise out of contracts). Partnerships do not arise from one party making a unilateral declaration of power over another -- as is the case here with Oklahoma's declaration of its power over Indian Housing Authorities. Congress did not intend to reduce Indian housing programs to the status of a state agency under state control nor did Congress indicate that it intended to give states the power to do so.

This excess of judicial power by Oklahoma also undermines Kiowa's judicial powers. If the sovereign right to self-government encompasses the power to make laws, then the reality and value of that power is lost unless there is

an ability to enforce those laws in the sovereign's own forums. *Santa Clara*, 98 S.Ct. at 1675.

Viewed in relation to the dispute at hand, it is plain that Oklahoma has taken from the tribal judicial system a basic function essential to self-government -- the adjudication of an internal dispute over the mechanisms of tribal government.[2] If Kiowa's tribal court has no power over such a dispute as this, either because of state court claims to jurisdiction or because KHA is a "state agency", then the result is inescapable damage to Kiowa's right to self-government. For example, both KHA and the tribal members that benefit from its programs are almost categorically barred from resolving any disputes in a tribal forum. Rather, both KHA and tribal members are forced into a state forum -- at best, an

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[2] The extent of Oklahoma's infringement upon tribal judicial power is further demonstrated by the Court of Indian Offenses' dismissal of Respondents' suit against members of the Kiowa Business Committee, referenced at page 9 of this Petition for Writ of Certiorari. The Honorable Phil Lujan, Magistrate, concluded that the Kiowa Court of Indian Offenses was without jurisdiction to rule upon the merits of the very tribal political dispute over housing programs that triggered this Petition for Writ of Certiorari. His rationale turned heavily upon the court's lack of power to enter orders against KHA, which he viewed as either a "state entity" or a "hybrid". Judge Lujan's order is reproduced in the Appendix at p. 26-28.

odd result from a federal program designed to promote self-determination and tribal self-government.

The United States policy concerning tribal courts recognizes the necessary connection between the power to make law and the power to enforce law. Thus, this Court has recognized that tribal courts play a vital role in tribal self-government. The Federal Government has consistently encourage development of tribal courts. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987). This Court protects tribal courts from being undermined by the exercise of state court jurisdiction. *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). This Court has even divested state courts of jurisdiction, as a matter of federal law, when state court jurisdiction interfered with tribal sovereignty and self-government. *Fisher v. District Court*, 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976).

This Court goes so far to protect tribal court jurisdiction that it does not allow a federal court to impair the authority of tribal courts. Thus, federal courts stay action until tribal courts have had full opportunity to determine their own jurisdiction. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). Even Congress' grant of diversity jurisdiction to federal courts does not impair tribal court jurisdiction. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987).

Oklahoma courts do not follow this federal policy when they assume power to adjudicate what is an intra-tribal political dispute. They do not engage in the Tenth Circuit approach of recognizing that an Indian Housing Authority may be a "tribal organization" within some contexts. As a result, rather than taking the federal course and deferring to the tribal judicial system for a determination of its own jurisdiction, Oklahoma courts merely proceed as though no such tribal system exists.

As an Oklahoma based tribe, Kiowa is not alone in trying to protect its right to self-determination and self-government from this situation. There are 37 federally recognized Indian tribes in Oklahoma. Of these 37 tribes, 35 conduct housing programs, originally under the 1937 Act and now under NAHASDA. Each tribe must accept state law restrictions on its own sovereign power to make laws to select those who govern its housing program. Each tribal court must contend with Oklahoma courts that take power that should be left to a tribal forum.

The writ of certiorari should issue to prevent an infringement upon Kiowa's inherent sovereign right to make and be governed by its own laws, to protect its tribal court from undermining by exercise of state court jurisdiction and to protect Congress' policy of encouraging tribal self-determination and self-government.

CONCLUSION

A writ of certiorari should be granted to the Oklahoma Supreme Court.

Respectfully submitted,

R. BROWN WALLACE
Counsel of Record
SHELIA D. TIMS
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Appendix 1

HOUSING AUTHORITY OF THE KIOWA TRIBE OF OKLAHOMA v. WARE

No.93295

____P.3d____

2000 OK 60

Decided: July 18, 2000

Mandate Issued: September 25, 2000

Supreme Court of the State of Oklahoma

HOUSING AUTHORITY OF THE KIOWA TRIBE OF OKLAHOMA, an agency of the State of Oklahoma; ART UNAP, JR., Chairman, DOROTHY PALMER, Vice-Chairman, SANDRA QUOETONE, Secretary-Treasurer, as Officers of the Board of Commissioners of the Housing Authority of the Kiowa Tribe of Oklahoma,
Plaintiffs/Appellees,

V.

RANDALL WARE, RICHARD KAUAHQUO, CAROL FRAME, WILLIAM TARTSAH, and WENDELL AUTAUBO,
Defendants/Appellants.

APPEAL FROM THE DISTRICT COURT OF CADDO COUNTY, OKLAHOMA
HONORABLE RICHARD G. VAN DYCK

The plaintiffs/appellees are commissioners of the Kiowa Housing Authority who were elected by vote of the Kiowa Indian Council and whose terms have expired by passage of time. The defendants/appellants claimed to be commissioners of the Kiowa Housing Authority lawfully appointed by the

chairman of the Kiowa Business Committee. Title 63 O.S. 1991 § 1057 provides that the chief or other governing head of an Indian tribe has authority to appoint commissioners to the Indian Housing Authority. The trial court determined that the Kiowa Indian Council is the governing body of the tribe and that tribal election is the proper procedure to select commissioners to the Kiowa Housing Authority. The defendants/appellants appealed and their motion to retain the appeal was granted.

AFFIRMED.

Nathan H. Young, III, Tahlequah, Oklahoma, for Appellees.
L. Elizabeth Brown, R. Brown Wallace, ANDREWS DAVIS LEGG BIXLER MILSTEN & PRICE, Oklahoma City, Oklahoma, for Appellants.

HARGRAVE, V.C.J.

1 This case involves a dispute between two groups of individuals in the Kiowa Tribe, each claiming to be the rightful commissioners to the Kiowa Housing Authority. The plaintiffs were elected by a vote of the tribe, as has been the procedure since adoption of the Kiowa Constitution, and have refused to vacate their offices until new commissioners are properly elected. The defendants were appointed by the chairman of the Kiowa Business Committee.

2 The plaintiffs/appellees sought declaratory relief in district court, asking for a determination that they are the lawful commissioners of the Kiowa Housing Authority and that only the Kiowa Indian Council can appoint commissioners to the Kiowa Housing Authority, by holding an election. The defendants counterclaimed, asking for a determination by the

court that the chairman of the Kiowa Business Committee is the proper appointing authority. In the alternative, appellants argue that state courts lack jurisdiction because of tribal sovereign immunity.

3 The trial judge ruled in favor of the plaintiffs, finding that jurisdiction existed by reason of *Housing Authority of the Choctaw Nation v. Craytor*, 1979 OK 100, 600 P.2d 314, and holding 1) that the governing body of the Kiowa Tribe is the Kiowa Indian Council, and 2) that commissioners to the Kiowa Housing Authority should be elected. The defendants/appellants appealed and filed a motion to retain the appeal in this Court. The motion to retain was granted. We find that the trial court correctly determined that it had jurisdiction and correctly ruled that the Kiowa Indian Council is the governing body of the Kiowa tribe and that election is the proper procedure.

4 The appellant has briefed two issues on appeal: whether the chairman of the Kiowa Business Committee is the proper appointing authority, and whether the district court has jurisdiction. The appellees have not filed a brief on appeal, but ask us to determine the case based on the trial court's findings of fact and conclusions of law. [1]**Appellants argue, and appellees agree, that this case is of a public nature, so that the Court should search the record and decide the case as it sees fit based upon the law and the facts.**

I. JURISDICTION

5 Although the defendants/appellants argue that sovereign immunity bars the action because Oklahoma courts have no jurisdiction over a dispute involving the internal political affairs of a tribal housing authority and its related federally

recognized Indian Tribe, citing *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S. Ct. 1700, 140 L.Ed.2d 981 (1998), the appellants do not object to this Court's deciding the state law question, and in fact ask us to do so. In the introduction to their brief on appeal, the appellants recognize that the question to be answered involves interpretation of state law, but they object to the trial court's apparently *ordering* the Kiowa Tribe to hold an election. Appellants urge this court to stay withing the bounds of analyzing tribal political structure solely as a tool for interpreting an Oklahoma statute. Because we find that the trial judge did not order the Kiowa Tribe to conduct an election, but merely determined that an election was the proper procedure to be followed, we find that the trial court did not exceed its jurisdiction.

6 The question of state court jurisdiction to interpret the Indian Housing Authority statute has previously been decided by this Court. In *Housing Authority of the Choctaw Nation v. Craytor*, 1979 OK 100, 600 P.2d 314, the threshold question was whether the court had jurisdiction over the matter as a question of state law rather than an intra-tribal matter. We held that state courts have jurisdiction under 63 O.S. § 1057 to determine who is authorized to appoint Commissioners to Indian housing authorities. *Craytor* was a dispute between two groups of individual tribal members, each of whom claimed to be the lawfully-appointed commissioners of the Choctaw Nation Housing Authority. We held that it was not an intra-tribal matter, but rather was a question of interpretation of the statute to determine whether the executive director of the Choctaw Nation was empowered to appoint commissioners. The appellants recognize that section1057 makes the Indian housing authority an agency of the State of Oklahoma. In *Craytor*, we held that because the

Indian Housing Authority was an agency of the State of Oklahoma, and because the power to appoint commissioners to the housing authority was derived from the statute, rather than from the Choctaw Nation, it was a matter for the district court.

7 Lastly, in the case at bar the tribe has not been sued; the defendants are individual members of the tribe who claim to have been properly appointed by the chairman of the Kiowa Business Committee. Sovereign immunity does not extend to individual members of the tribe. *United States v. James, 980 F.2d 1314, 1319 (9th Cir. 1992), cert. den. James* v. *U.S., 510 U.S. 838 (1993), citing Puyallup Tribe, Inc. v. Washington Game Dep't 433 U.S. 165, 173, 97 S.Ct. 2616, 2621, 53 L.Ed.2d 667(1977).*

II. THE KIOWA CONSTITUTION DEFINES THE KIOWA INDIAN COUNCIL AS THE TRIBE'S GOVERNING BODY

8 The Oklahoma Housing Authority Act, 63 O.S. 1991 § 1051, et. seq., creates a housing authority in every city in the state. No business may be transacted until the governing body of each city has passed a resolution declaring the need for a housing authority. Section 1057 of the Oklahoma Housing Authority Act creates the Indian Housing Authority, which likewise cannot transact any business until the governing council of the tribe, band or nation has passed a resolution declaring the need for a housing authority. Section 1057 provides that the housing authority of an Indian tribe, band or nation shall be an agency of the State of Oklahoma, possessing all powers, rights and functions specified in the Act for city and county authorities.

9 Title 63 O.S. 1991 § 1057 provides that the chief or other governing head of an Indian tribe, band or nation is authorized to exercise the same appointing powers with respect to an Indian housing authority that are vested in the mayor of a city for appointments to a city housing authority. The mayor of a city may appoint commissioners to the housing authority, with the advice and consent of the city's governing body. 63 O.S. §1058. The parties agree that the Kiowa Tribe does not have a chief, nor an individual specifically designated as the governing head of the tribe. The Kiowa Constitution defines the Kiowa Indian Council, which consists of all adults over eighteen (18) years of age, as the governing body of the tribe.

10 The record reflects that after adoption of the Kiowa Constitution, commissioners to the Kiowa Housing Authority have been chosen by election. The plaintiffs/appellees are commissioners of the Kiowa Housing Authority who were elected by vote of the Kiowa Indian Council, and whose terms have expired by passage of time. The defendants/appellants are commissioners of the Kiowa Housing Authority appointed by the chairman of the Kiowa Business Committee. The plaintiffs/appellees refuse to vacate their positions until they have been replaced by duly elected commissioners, relying on 63 O.S. § 1058, which provides that each commissioner shall hold office until his or her successor has been appointed and qualified.

11 Appellants argue that the statutory phrase "chief or other governing head" is ambiguous when applied to Kiowa Tribe, and that the intent of the legislature was for an *individual* to appoint commissioners. As to the Kiowa Tribe, they argue that the language must mean a tribal official holding an office comparable to that of mayor, and that the chairman of the

Kiowa Business Committee is the person in the tribe most closely akin to the mayor of a city. This argument without merit. The statute does not *require* that an appointment be made by an individual; the statute gives authority to appoint to the chief or other governing head. If there is no chief or other governing head designated by the Tribe, then commissioners to their housing authority must be appointed by their designated governing body.

12 The constitution of the Kiowa Indian Tribe of Oklahoma defines the Kiowa Indian Council as the governing body of the tribe. The Kiowa Indian Council is composed of all members of the tribe at least 18 years of age or over. Matters outlined in article V, section 1 of the Kiowa Constitution are to be presented and discussed at meetings of the Kiowa Indian Council, pursuant to article XVI of the Kiowa Constitution. Decisions on the issues discussed, however, shall be made only by a subsequent election which shall be open to all qualified voters of the tribe, as provided in article XVII of the Kiowa Constitution.

13 Section 1 of article V vests the Kiowa Indian Council with authority to act on matters such as approval of an annual budget, claims, sale of tribal land, long term industrial, commercial or development leases, contracts with federal, state or local governments or private firms, legal counsel contracts, selection of tribal employees. *All other powers not vested in the business committee by section 2 are retained by the Kiowa Indian Council.* The section provides that any of powers of the Kiowa Indian Council may be delegated to the business committee. There is no delegation with respect to the Kiowa Housing Authority.

14 The Kiowa Business Committee is an eight (8) member representative body empowered to act only on those matters outlined in article V, section 2 of the Kiowa Constitution. The Kiowa Business Committee is empowered by article V, section 2 of the Kiowa Constitution to take necessary action on the following: a) revocable permits, farm and grazing leases; oil, gas and mineral leases; easements and rights-of-way; b) appoint subordinate committees; c) promote arts and crafts and Kiowa Indian Culture; d) prepare annual budgets for submission to and approval of the Kiowa Indian Council; e) Accept applications for tribal employment and submission to the Kiowa Indian Council for selection; f) determine term of employment and salary of tribal employees; g) promulgate and enforce ordinances and codes governing law and order to protect the peace, health, safety and general welfare, on land determined to be within tribal jurisdiction subject to the approval of the Assistant Secretary for Indian Affairs or his authorized representative; h) develop, negotiate and approve economic, industrial and commercial enterprises and leases on land owned solely by the Kiowa Tribe as long as the lease term does not exceed 50 years; i) the Kiowa Business Committee shall be authorized to promulgate and enforce codes and ordinances to levy and collect taxes within the area of the tribe's jurisdiction, . . etc.

15 Section 5 of the Kiowa Constitution also contains a Reserve Power Clause, which provides that any right and power vested in the Kiowa Indian Tribe not expressly referred to in the constitution may be exercised by the members of the Kiowa Indian Council through the adoption of appropriate amendments to the constitution and bylaws. Further, all powers not *expressly vested* in the Kiowa Business Committee are reserved to the Kiowa Indian Council.

16 The above-quoted portions of the Kiowa Constitution reflect that the Kiowa Business Committee, and its Chairman, have limited authority to Act. No mention is made in the Kiowa Constitution of the Kiowa Housing Authority. The Kiowa Constitution contains no provision delegating authority to the Kiowa Business Committee, or to its chairman, to appoint commissioners to the Kiowa Housing Authority.

17 All powers not given specifically to the Kiowa Business Committee or its Chairman are reserved to the Kiowa Indian Council. The Kiowa Tribe has designated its governing body in its Constitution and has provided for elections to determine important, non-delegated matters. The statute is not offended if the appointing authority is not an individual.

18 The trial court correctly ruled that under the provisions of pertinent state law, the Kiowa Indian Council was the governing body with power to appoint commissioners to the Kiowa Housing Authority and ruled that an election is the proper procedure for selecting those commissioners. The trial judge did not *order* the Kiowa Tribe to conduct an election, nor could he have done so. It is, in effect, of no concern to the state courts whether an election is in fact held. The trial court merely interpreted a state statute to mean that the Kiowa Indian Council is the governing body of the tribe and declared that the proper procedure for choosing commissioners to the Kiowa Housing Authority is by election.

AFFIRMED.

19 **ALL JUSTICES CONCUR**

Appendix 10

FOOTNOTES

[1]The appellants have filed a motion for this Court to search the record and decide the case without a brief from the appellees because the question is of a public nature, citing *Application of Goodwin, 597 P.2d 762 (Okla. 1979).* The appellees filed a response concurring in the motion, stating that all of the law and facts cited in the district court's findings of fact and conclusions of law are sufficient for the Court to rely on.

Appendix 11

STATE OF OKLAHOMA
CADDO CO.
FILED JUNE 4, 1999

IN THE DISTRICT COURT IN AND FOR CADDO COUNTY
STATE OF OKLAHOMA

HOUSING AUTHORITY OF THE KIOWA TRIBE OF OKLAHOMA, an agency of the State of Oklahoma, et al

Petitioners,

v. Case No. CJ-98-118

RANDALL WARE, et al

Respondents,

ORDER

The above styled matter came on for trial on the 10th day of March, 1999, petitioners appearing by counsel, Nathan H. Young, III and Tim Gifford, and the defendants appearing by counsel, L. Elizabeth Brown and R. Brown Wallace. After hearing some testimony and argument on the above date, the parties submitted proposed findings of fact and conclusions of law. After reviewing the evidence, relevant case and statutory law and the proposed findings of fact and conclusions of law submitted by the parties, the Court makes the following findings:

1. This court has jurisdiction over the Kiowa Housing Authority by its creation pursuant to 63 O.S. §1057 and the

holding in *Housing Authority of the Choctaw Nation v. Craytor*, 600 P.2d 314 (Okla. 1979).

2. The Kiowa Housing Authority was authorized by Resolution 69-1 adopted February 8, 1969, by action of the Kiowa Tribal Council, to serve as its housing authority. In said resolution, all powers concerning a housing authority were delegated to the Kiowa Interim Business Committee.

3. At the time of the creation of the housing authority the Kiowa Tribe did not have a constitution, or at least, the constitution now governing the tribe was not in effect.

4. The Constitution and Bylaws of the Kiowa Tribe were ratified by a majority of its members on May 23, 1970.

5. A reading of 63 O.S. §1057 finds that commissioners of the housing authority are to be appointed by the governing head of the entity creating the authority.

6. Article I, Section 2 of the Constitution and Bylaws of the Kiowa Tribe of Oklahoma (Constitution) clearly states that the governing body of the tribe is the Kiowa Indian Council (KIC).

7. Nowhere in the Constitution does it empower the Kiowa Business Committee (KBC) to appoint commissioners to the housing authority. Article V, Section 2 sets out the powers of the KBC. Those powers do not include appointing commissioners to the housing authority.

8. Nowhere in the Constitution does it continue the Kiowa Interim Business Committee. In fact, an election of the KIC was held on the 3rd day of June, 1973, where a question was posed to the members whether to ratify the actions of the Kiowa Housing Authority prior to the adoption of the Constitution. This proposition was approved by a majority of the KIC voting. Another question on the same ballot was whether to allow the KBC to appoint commissioners to the Kiowa Housing Authority when a vacancy occurs for whatever reason other than the expiration of a term. This measure was not approved by the KIC. Following this reasoning, the Court finds that at this point in time all vacancies to the Kiowa Housing Authority, whether during or at the expiration of a term, were to be filled by a vote of the KIC.

9. When the Constitution was ratified the Kiowa Interim Business Committee ceased to exist and the terms of the Constitution governed the tribe and its operations.

10. When faced with a similar argument, Caddo County Associate District Judge David Powell in case number C-89-29 found that the appointment of Housing Authority Commissioners was by a vote of the KIC.

11. The Kiowa Election Board states that it has *always* placed the housing commissioner positions on the annual June tribal election ballot. However, it appears that since the June, 1996 election, the housing commissioner positions have not been placed on the ballot because the housing authority failed to pay for its share of the election costs.

Therefore, this court finds and orders that Commissioners of the Kiowa Housing Authority are to be elected to their positions by a vote of the KIC. The KBC has no authority to appoint commissioners to the Kiowa Housing Authority. Even when a commissioner's term has expired, the office will carry over until a successor has been appointed and qualified. 63 O.S. §1058. The Kiowa Indian Council must hold an election to appoint commissioners to the housing authority.

IT IS SO ORDERED!

Dated this 4th day of June, 1999.

/S/_____
Richard G. Van Dyck
District Judge

Court Clerk Please send copies to:

All Counsel of record

Appendix 15

24 CFR § 905.108 (Repealed)

An IHA may be established either:

* * *

(b) Pursuant to a state law which provides for establishment of IHAs with all necessary legal powers to carry out low income housing projects for Indians.

§ 1057. Creation of Indian housing authorities.

There is hereby created, with respect to each Indian tribe, band, or nation in the state, a public body corporate and politic, to function in the operating area of such Indian tribe, band, or nation to be known as the "housing authority" of said Indian tribe, band, or nation, which shall be an agency of the State of Oklahoma, possessing all powers, rights, and functions herein specified for city and county authorities created pursuant to this act:[1] Provided that said Indian housing authority shall not transact any business nor exercise its powers hereunder until or unless the governing counsel of said tribe, band, or nation, as the case may be, by property resolution, declares that there is a need for an authority to function for said tribe, band, or nation.

Except as otherwise provided in this act, all the provisions of law applicable to housing authorities created for cities and counties and the commissioners of such authorities shall be applicable to Indian housing authorities and the commissioners thereof, unless a different meaning clearly appears from the context. The Chief or other governing head of an Indian tribe, band, or nation is hereby authorized to exercise all appointing and other powers with respect to an Indian housing authority that are vested by this act in the mayor of a city relating to a city housing authority.

[1] Title 63 § 1051 et seq.

Appendix 17

STATE OF OKLAHOMA
CADDO CO.
FILED JUNE 4, 1999

IN THE DISTRICT COURT WITHIN AND
FOR CADDO COUNTY
STATE OF OKLAHOMA

HOUSING AUTHORITY OF THE KIOWA TRIBE OF OKLAHOMA, an agency of the State of Oklahoma, ART UNAP, JR., Chairman, DOROTHY PALMER, Vice-Chairman, SANDRA QUOETONE, Secretary-Treasurer, as Officers and the Board of Commissioners of the Housing Authority of the Kiowa Tribe of Oklahoma,

Petitioners,

vs. Case No. CJ-98-118

RANDALL WARE, RICHARD KAUAHQUO, CAROL FRAME, WILLIAM TARTSAH, and WENDELL AUTAUBO,

Defendants.

ANSWER AND COUNTERCLAIM OF DEFENDANTS RANDALL WARE, RICHARD KAUAHQUO, CAROL FRAME, WILLIAM TARTSAH AND WENDALL AUTAUBO

Defendants, Randall Ware, Richard Kauahquo, Carol Frame, William Tartsah and Wendell Autaubo, answer plaintiffs' petition for declaratory relief and temporary and

permanent injunction as set forth below. The numbered paragraphs correspond to those in the petition. Plaintiffs' allegations are denied unless expressly admitted.

1. Defendants admit that Oklahoma law purports to make the Kiowa Housing Authority ("KHA") a State agency but the creation, operation and control of the KHA also involves tribal and federal law.

2. Denied. Each plaintiff's term has long since expired. Ms. Palmer and Ms. Quoetone's one-year terms began in 1995 and expired in 1996. Mr. Unap's three-year term began in 1985 and expired in 1988.

3. Denied. Defendants are the lawful commissioners of the KHA. They were properly appointed to fill the three expired terms and the two vacancies.

* * *

COUNTERCLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF

For their counterclaim against plaintiffs, defendants state as follows:

1. Defendants are the lawfully appointed KHA commissioners. They were appointed by the Chairman. Both state and tribal law give the Chairman the power to appoint commissioners. Under state law, §1057 of Title 63 grants the Chairman, as the Tribe's governing head, the

authority to appoint the commissioners. Under tribal law, the Kiowa Constitution states that the Chairman is the presiding officer at meetings of the Kiowa Business Committee and at meetings of the Kiowa electorate. (See Kiowa Constitution, Art. XII, § 1, attached as Exhibit A.) By resolution, the Kiowa electorate specifically granted to the power to appoint KHA commissioners. (See Resolution, attached as Ex. B.)

2. As KHA commissioners, defendants requested that plaintiffs turn over to them the Anadarko business office and all records and assets of the KHA.

3. Plaintiffs refused to turn over the office, records and assets of the KHA to defendants.

4. Plaintiffs are not authorized to continue to act as KHA commissioners. Their terms expired years ago and they have not been reinstated by appointment, election or any other means.

5. Plaintiffs' conduct in continuing to act as the authorized KHA commissioners injured defendants because plaintiffs' conduct significantly interferes with the Kiowa Tribe's right to self-government and its ability to operate a housing program under tribal, federal and state law.

* * *

Appendix 20

STATE OF OKLAHOMA
CADDO CO.
FILED MARCH 3, 1999

IN THE DISTRICT COURT
SIXTH JUDICIAL DISTRICT
CADDO COUNTY
STATE OF OKLAHOMA

HOUSING AUTHORITY OF THE KIOWA TRIBE OF OKLAHOMA, an agency of the State of Oklahoma, ART UNAP, JR., Chairman, DOROTHY PALMER, Vice-Chairman, SANDRA QUOETONE, Secretary-Treasurer, as Officers and the Board of Commissioners of the Housing Authority of the Kiowa Tribe of Oklahoma,

Petitioners,

vs. Case No. CJ-98-118

RANDALL WARE, RICHARD KAUAHQUO, CAROL FRAME, WILLIAM TARTSAH, and WENDELL AUTAUBO,

Defendants.

PRETRIAL CONFERENCE ORDER

* * *

4. Defenses:

Grounds for Defense	Applicable Statute, Ordinance, Common Law Rule
a. Plaintiffs' terms as commissioners of the Kiowa Housing Authority ("KHA") have expired. have expired.	63 Okla. Stat. § 1058 Oaths of Office for the plaintiffs

5. Counterclaim:

Grounds for Recovery	Applicable Statute, Ordinance, Common Law Rule
a. Lack of Subject Matter Jurisdiction	*Oneida County, NY v. Oneida Indian Nation of New York,* 470 U.S. 226, 105 S. Ct. 1245, 84 L.Ed.2d 169 (1985); *Seminole Tribe of Fla. v. Fla.*, 517 U.S. _, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. __, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).

* * *

Appendix 22

EXCERPTS FROM
TRANSCRIPT OF PROCEEDINGS
MARCH 10, 1999
IN THE DISTRICT COURT OF CADDO COUNTY
STATE OF OKLAHOMA
THE HONORABLE RICHARD G. VAN DYCK
DISTRICT JUDGE
PRESIDING IN
HOUSING AUTHORITY OF THE KIOWA TRIBE
OF OKLAHOMA, ET AL.
v.
RANDALL WORK, ET AL.
NO. CJ-98-118

* * *

THE COURT: Okay. Do you want to give an opening, Ms. Brown?

MS. BROWN: Your Honor, I have a pre-motion to address, a jurisdictional issue.

THE COURT: Uh-huh. Go ahead.

MS. BROWN: We would submit to the Court that this Court does not have jurisdiction over this case, Your Honor. This is a housing -- a tribal -- a Housing Authority for a Tribe. State courts don't have jurisdiction over the tribes. No one has consented to this suit.

And if we look at the strict reading of Section 1057 of the Housing Authority Act, I think we will find that although this is a state statute, and it did allow for its creation, that this statute itself vests the Tribe with complete control over this Housing Authority.

It was created with respect to the Tribe, it functions in the operating area of the Tribe. It in effect could not transact any business or exercize any powers. This statute would have been meaningless unless the Tribal Council had declared a need for the Housing Authority. And it also continues further to vest all powers of appointment within the Tribal officials.

A majority of the homes within this Housing Authority will be located on allotments, which are not within the jurisdiction of this Court. It's not subject to any state, city or county taxes. And for this state Court to assert jurisdiction would be an infringement on this Tribe's right to self-government to control this Housing Authority. This falls in line with the Ware case from the Western District of Oklahoma.

And I realize, Your Honor, that there's the Oklahoma Supreme Court case of Craytor out there, and it just -- it's wrongly decided.

* * *

THE COURT: Uh-huh. Did you concede in your argument, Ms. Brown, that the Housing Authority was created under the state statute?

MS. BROWN: Yes, Your Honor. It was created in accordance with that state statute.

THE COURT: Uh-huh.

MS. BROWN: But the rest of that was under the Ware case, which found that even though it was created under state statute, it's not under state control, it's unfettered Tribal control. And I have a copy of that case, Your Honor.

* * *

THE COURT: Okay. Ms. Brown, with this being a 1979 decision of the Supreme Court of Oklahoma, do you know of any case that's overturned this decision?

MS. BROWN: No, I do not, Your Honor.

THE COURT: Okay. Based on the decision of the Supreme Court in the Craytor case and finding that the Ware case does deal with issues that are different than are before the Court today, I will overrule your jurisdictional motion and find this Court does have jurisdiction to hear the matters.

* * *

Appendix 25

EXCERPTS FROM
PETITIONERS' BRIEF-IN-CHIEF
HOUSING AUTHORITY OF THE KIOWA TRIBE
OF OKLAHOMA, ET AL v. WARE, ET AL.
NO. 93,295
IN THE SUPREME COURT OF OKLAHOMA

* * *

PROPOSITION II

OKLAHOMA COURTS HAVE NO JURISDICTION OVER A DISPUTE INVOLVING THE INTERNAL POLITICAL AFFAIRS OF A TRIBAL HOUSING AUTHORITY AND ITS RELATED FEDERALLY RECOGNIZED INDIAN TRIBE

A. STATE COURTS HAVE NO POWER OVER TRIBES AND TRIBAL GOVERNMENT

* * *

B. TRIBAL IMMUNITY FROM SUIT CANNOT BE AVOIDED BY SUING TRIBAL OFFICIALS

* * *

Appendix 26

IN THE COURT OF INDIAN OFFENSES FOR
THE KIOWA TRIBE
ANADARKO, OKLAHOMA

HOUSING AUTHORITY OF THE KIOWA TRIBE OF OKLAHOMA, an agency of the State of Oklahoma; ART UNAP, JR., Chairman, DOROTHY PALMER, Vice-Chairman, and SANDRA QUOETONE, Secretary-Treasurer, as Officers and the Board of Commissioners of the Housing Authority of the Kiowa Tribe of Oklahoma,

Petitioners,

vs. Case No. CIV-97-A52

BILLY EVANS HORSE, ALVA D. TSOODLE, HERSCHEL SAHMAUNT, JOYCE WILLIS, GEORGE DAINGKAU, DENNIS KOPEPASSAH, EUGENE GEIONETY, SHARON HORSE, individually and in their official capacities, and JANE AND JOHN DOE,

Defendants.

ORDER

This matter was submitted to the Court for consideration without oral argument. The Court notes that this is both a case of first impression and a complicated fact situation. The complication was created by the historical exigency of trying to quickly establish tribal entities using

state law in Oklahoma to receive federal funds. This is further complicated by the hybridization of the election of board members by the Kiowa Tribal Council to this state entity. Further, recent federal law has provided a legal authorization for the transfer of the entity to receive the federal funding without specific procedures to accomplish such a transfer. Additionally, the Kiowa Business Committee and the Kiowa Indian Council are immune from suit in a state court on this issue. This present fact situation would require the Court of Indian Offenses to:

1. Interpret and determine the legal status of an entity created under state law.

2. Determine the nature and consequence hybridization of the Kiowa Housing Authority.

3. Interpret federal law concerning the requirements and procedures for the transfer of authority from the present housing authority to the tribal entity.

4. Possibly, enter orders mandating or restraining actions of a state entity.

The foregoing requirements are beyond the limited jurisdiction of the Court. The parties are not without a forum in that the federal district court is the appropriate forum to determine these disparate issues.

The fact that the Kiowa Housing Authority has initiated this matter as plaintiffs and the defendants have not raised

sovereign immunity does not alter the fundamental jurisdictional issues.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that this matter is dismissed for lack of jurisdiction over the parties and subject matter.

IT IS SO ORDERED !

/S/

PHIL LUJAN, Magistrate

(2)

Supreme Court, U.S.
FILED
DEC 12 2000
OFFICE OF THE CLERK

No. 00-586

In The

Supreme Court of the United States

RANDALL WARE, et al.,

Petitioners,

v.

HOUSING AUTHORITY OF THE KIOWA TRIBE OF OKLAHOMA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Oklahoma Supreme Court

RESPONDENT HOUSING AUTHORITY OF THE KIOWA TRIBE OF OKLAHOMA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether individual tribal members have standing to assert tribal claims?

2. Whether a state law, adopted pursuant to a federal law that approved state created Indian housing authorities and that defines certain procedures of operation for the Indian housing authorities, infringes upon an Indian tribe's ability to self-govern when the tribe voluntarily chose to establish and operate its housing authority under the state law?

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RESPONDENT HOUSING AUTHORITY OF THE KIOWA TRIBE OF OKLAHOMA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners, Randall Ware, Richard Kauahquo, Carol Frame, William Tartsah and Wendell Autaubo (hereinafter "Petitioners")[1] are seeking review of an unanimous decision by the Oklahoma Supreme Court that affirmed the well-reasoned decision of the Caddo County District Court. Both the Oklahoma Supreme Court and the Caddo County District Court held, pursuant to established, authoritative precedent, that the state court had jurisdiction to interpret the Oklahoma Housing Authorities Act, specifically 63 O.S. § 1057, as it relates to Indian housing authorities. Petitioners have not previously argued this point; in fact, Petitioners conceded the point before the Oklahoma Supreme Court stating that "[t]he very basic question in this case is no more than deciding the proper meaning of an Oklahoma statute." Appellants' Brief-in-Chief, p. 2.[2] Petitioners now assert, without prec-

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[1] Respondent's original Petition filed in the District Court of Caddo County named the Petitioners as Defendants without designation as to individual or official capacity and the case has continued with that style until now; however, in Petitioners' filing in this Court, Petitioners have now identified themselves as having an official capacity. This is a wrongful substitution of parties and should be ignored by the Court.

[2] Respondent's counsel has not been provided or able to obtain a complete copy of the record in this matter. Therefore, some cites to the record, by necessity, will be to the individual document rather than to the page of the record. Respondent apologizes for any inconvenience this may cause.

edent or statutory basis and without standing to assert such a claim, that the Oklahoma Housing Authorities Act infringes upon the Kiowa Tribe's right of self-government. Because Petitioners failed to present any valid argument for the asserted position, the Petition for Writ of Certiorari must be denied.

A. BACKGROUND

The statutory authority for housing programs for what later became the United States Department of Housing and Urban Development ("HUD") was contained in the United States Housing Act of 1937 ("1937 Act"), which authorized loans for development and administration of public, low rent housing.[3] Indian participation in such programs was approved by a 1940 Interior Solicitor opinion that concluded that Indian tribes are governmental entities capable of undertaking housing enterprises.[4] However, it wasn't until 1961 that HUD's predecessor, the Public Housing Administration, determined that Indian tribes with established governing bodies could participate in its housing programs. For funding purposes, regulations allowed an Indian housing authority to be created pursuant to either state or tribal law.[5]

On June 18, 1965, the State of Oklahoma enacted the "Oklahoma Housing Authorities Act" which is codified at

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[3] Act of September 1, 1937, ch. 896, 50 Stat. 888 (codified as amended at 42 U.S.C. §§ 1437-1437j).

[4] 57 Interior Dec. 145 (1940).

[5] 24 C.F.R. §§ 805.108-.109 (1980).

63 O.S. § 1051 *et seq.* The creation of Indian housing authorities within the State was expressly provided for at 63 O.S. § 1057. See Petition for Certiorari, Appendix, p. 16. The operation of each of these Indian housing authorities was contingent upon the governing council of each tribe adopting a resolution declaring the need for a housing authority to function for the tribe. Four years later, on February 8, 1969, the Kiowa Tribe, in an exercise of its tribal powers, adopted Resolution No. 69-1 and made such a declaration as follows:

> BE IT RESOLVED, by the Kiowa Tribal Council that the Kiowa Tribe shall enter fully into such housing programs and to that end the Kiowa Tribal Interim Business Committee is authorized and directed to initiate action to participate in available housing programs for the benefit of those interested Kiowa tribal members and *to create a tribal housing authority in accordance with the provisions of the Oklahoma Housing Authorities Act* . . .

See R. 77 (emphasis added).

A few days later, on March 1, 1969, the Kiowa Interim Business Committee adopted Resolution No. 69-10, which states in pertinent part as follows:

> Section 1. The Kiowa Tribal Interim Business Committee of the Kiowa Tribe of Indians of Oklahoma, hereby determines, finds and declares in pursuance of the "Oklahoma Housing Authorities Act" that:
>
> * * *

C. There is a need for the Housing Authority of the Kiowa Tribe of Indians of Oklahoma to function.

Section 2. In accordance with the foregoing finding the Housing Authority of the Kiowa Tribe of Indians of Oklahoma, *is authorized to transact business and exercise its powers pursuant to the "Oklahoma Housing Authorities Act."*

See R. 354 (emphasis added).

On March 23, 1970, the Constitution and Bylaws of the Kiowa Indian Tribe of Oklahoma ("Constitution") was ratified by a vote of the Kiowa people. The Constitution, as the organic law for the Kiowa Tribe, defined and established the organization of the tribe's government. Article I, Section 2 defines the Kiowa Indian Council ("KIC"), a group composed of all tribal members who are at least eighteen (18) years of age or over, as the governing body of the tribe. Consistent with this plan of hierarchy, Article V defines the powers of the KIC and reserves to the KIC all powers not vested in the Business Committee.[6] Although the Constitution contains no direct

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[6] The powers of the Kiowa Business Committee are outlined in Article V, Section 2 as follows:

a. Revocable permits, farm and grazing leases; oil, gas and mineral leases; easements and rights-of-way.

b. Appoint subordinate committees

c. Promote arts and crafts and Kiowa Indian Culture

d. Prepare annual budgets for submission to and approval of the Kiowa Indian Council

mention of the housing authority, it is clear that any powers relative to the housing authority and appointment of its Commissioners have been retained by the KIC. The practice of the Tribe and the record in this case reflect that since adoption of the Constitution in 1970, housing authority commissioners have been elected by the KIC.

B. CURRENT LITIGATION

On May 13, 1998, the KHA was informed of the unlawful appointment of the petitioners as Commissioners of the KHA. See R. 333. On May 15, 1998, the KHA

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e. Accept applications for tribal employment and submission to the Kiowa Indian Council for selection

f. Determine term of employment and salary of tribal employees

g. To promulgate and enforce ordinances and codes governing law and order to protect the peace, health, safety and general welfare, on land determined to be within tribal jurisdiction subject to the approval of the Assistant Secretary for Indian Affairs or his authorized representative. (Amended 6/84)

h. Develop, negotiate and approve economic, industrial and commercial enterprises and leases on land owned solely by the Kiowa Tribe as long as the terms of any such lease (including option) does not exceed fifty (50) years. (Amended 6/85)

i. The Kiowa Business Committee shall be authorized to promulgate and enforce codes and ordinances to levy and collect taxes within the area of the tribe's jurisdiction, except that no tax shall be levied or collected on the lease income of the Kiowa tribal members or on the value of individually owned trust property. (Amended 6/85)

filed its Petition in the Caddo County District Court against the five named individuals requesting injunctive relief to prevent the Petitioners from wrongfully assuming control of the housing authority and a declaratory judgment determining that its officers, who were duly elected by the KIC, were the lawful Board of Commissioners of the KHA and requesting a finding that the Kiowa Indian Council, as the governing body of the Kiowa Tribe, must elect Commissioners for KHA. This court action by KHA was in response to unlawful attempts by the individual Petitioners, pursuant to unconstitutional appointments by the Chairman of the Kiowa Business Committee, to take control of the KHA and all its assets in total disregard of long-standing state and tribal law.

In response, Petitioners argued that the appointment powers of the Chairman of the Kiowa ***Interim*** Business Committee had succeeded to the current Chairman of the Kiowa Business Committee despite the approval and passage of the Kiowa Constitution in 1970 and its clear language to the contrary. In the lower Court, Petitioners attempted to avoid the clear mandate of the Kiowa Constitution by asserting that the term "governing body" as used in the state law did not indicate a clear intent. This confusing and inaccurate argument was correctly rejected by the Caddo County District Court on June 4th, 1999. Judge Richard G. Van Dyck, after a full hearing and briefing by the parties, held, in part, as follows:

> 5. A reading of 63 O.S. § 1057 finds that commissioners of the housing authority are to be appointed by the governing head of the entity creating the authority.

6. Article I, Section 2 of the Constitution and Bylaws of the Kiowa Tribe of Oklahoma (Constitution) clearly states that the governing body of the tribe is the Kiowa Indian Council (KIC).

7. Nowhere in the Constitution does it empower the Kiowa Business Committee (KBC) to appoint commissioners to the housing authority. Article V, Section 2 sets out the powers of the KBC. Those powers do not include appointing commissioners to the housing authority.

8. Nowhere in the Constitution does it continue the Kiowa Interim Business Committee. . . .

9. When the Constitution was ratified the Kiowa Interim Business Committee ceased to exist and the terms of the Constitution governed the tribe and its operations.

* * *

Therefore this court finds and orders that Commissioners of the Kiowa Housing Authority are to be elected to their positions by a vote of the KIC.

Petition for Writ of Certiorari, Appendix, pp. 12-14

Petitioners appealed the decision to the Oklahoma Supreme Court proposing the primary issue of whether Oklahoma law allows the Chairman of the Kiowa Business Committee to appoint commissioners or requires the entire voting membership of the tribe (the Kiowa Indian Council) to elect commissioners by popular vote in a tribal election. Appellants' Oklahoma Supreme Court

Brief-in-Chief, pp. 1-2. Under the misconception that the District Court had ordered the tribe to hold an election, Petitioners also briefed the issue of sovereign immunity and jurisdiction. The KHA did not file a brief in the Supreme Court of Oklahoma choosing instead to rely on the trial court's findings of fact and conclusions of law.

The Supreme Court of Oklahoma, on July 18, 2000, unanimously affirmed the District Court and held that jurisdiction was proper pursuant to authoritative case law previously decided by that Court, ***Housing Authority of the Choctaw Nation v. Craytor***, 1979 OK 100, 600 P.2d 314 (Okla. 1979), and that sovereign immunity was not an issue because neither the tribe nor tribal officials had been sued. Further, the Court held that the state law required that the commissioners be appointed by the governing head of the tribe. After analyzing the Kiowa Constitution in relation to the requirements of the state law, the Court concluded that the Kiowa Constitution clearly defined the Kiowa Indian Council ("KIC") as the governing body of the tribe and that the KIC, *not* the Kiowa Business Committee or its Chairman, had the authority to choose the Commissioners for the KHA and that the proper process for this appointment was an election. The Court clarified and affirmed the position of the Trial Judge by stating as follows:

> The trial court correctly ruled that under the provisions of pertinent state law, the Kiowa Indian Council was the governing body with power to appoint commissioners to the Kiowa Housing Authority and ruled that an election is

> the proper procedure for selecting those commissioners. *The trial judge did not* ***order*** *the Kiowa Tribe to conduct an election, nor could he have done so.* It is, in effect, of no concern to the state courts whether an election is in fact held. The trial court merely interpreted a state statute to mean that the Kiowa Indian Council is the governing body of the tribe and declared that the proper procedure for choosing commissioners to the Kiowa Housing Authority is by election.

Petition for Writ of Ceriorari, Appendix, p. 9.

The Petitioners, in an abrupt change of position, now abandon their argument regarding the necessity of the interpretation of the state law and instead assert that the state law infringes on the tribe's right of self-government. Petitioners have taken a careless position that attempts to mix and confuse tribal sovereignty and tribal right of self-government with the requirements of a state law, adopted pursuant to federal law and endorsed by the Tribe, that needs only a clear interpretation of the Kiowa Constitution for its enforcement. By definition, infringement on the tribe's sovereignty or right of self-government cannot exist under the auspices of the Oklahoma Housing Authorities Act. The Kiowa Tribe chose to have a functioning housing authority pursuant to the provisions of the Oklahoma Housing Authorities Act, 63 O.S. § 1051 *et seq.* The Kiowa Tribe, as well, chose to clearly designate the KIC as the governing body of the tribe and to limit the authority of the KBC and its Chairman. Rather than an infringement on the tribe's right of self-government, this state law presented the opportunity for the tribe to exercise its right to self-government which it did in passing the resolution to organize the KHA under the laws of

the State of Oklahoma. There is no precedent or statutory basis for the arguments presented by the Petitioners and the Petition for Certiorari must be denied.

REASONS WHY THE WRIT SHOULD BE DENIED

A petition for writ of certiorari is granted for "compelling reasons."[7] Because the Petitioners have not

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[7] Sup. Ct. Rule 10 states as follows:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. *A petition for a writ of certiorari will be granted for compelling reasons.* The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that

articulated any compelling reason for granting certiorari, the petition must be denied.

I. THE WRIT MUST BE DENIED BECAUSE THE KIOWA TRIBE IS NOT A PARTY TO THIS SUIT AND PETITIONERS LACK STANDING TO ASSERT TRIBAL CLAIMS

The Petitioners named in this lawsuit are five individuals who were wrongfully appointed by the Chairman of the Kiowa Business Committee and who attempted to wrongfully take control of the KHA in violation of state and tribal law. The Tribe is not a named party and, as an entity, is not implicated in the allegations contained in the Respondent's original Petition. Therefore, tribal sovereignty, which is subtlety argued by the Petitioners,[8] is not applicable to the instant matter. The Supreme Court of Oklahoma recognized this long standing principle and held that "sovereign immunity does not extend to individual members of the tribe." ***Housing Authority of the Kiowa Tribe of Oklahoma v. Ware***, 2000 OK 60, ___ P.3d ___ (Okla. 2000), *citing* ***United States v. James***, 980 F.2d 1314, 1319 (9th Cir. 1992), ***cert. den., James v. U.S.***, 510 U.S. 838 (1993), *citing* ***Puyallup Tribe, Inc. v. Washington Game Dep't.***, 433 U.S. 165, 173, 97 S. Ct. 2616, 2621, 53

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conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

[8] Petition for Certiorari, pp. 13, 14, and 17.

L.Ed.2d 667 (1977). Contrary to the Petitioners' assertions that the Oklahoma Supreme Court avoided the holding in ***Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.***, 523 U.S. 751 (1998), sovereign immunity is clearly not applicable.

Petitioners, as the named individual defendants, lack standing to assert claims relating to tribal infringement. It is the Kiowa Tribe, not the individual defendants, that would suffer harm if the state law did, in fact, infringe on the Tribe's right to self-govern. Further, Oklahoma precedent has established that standing is composed of at least three elements, including 1) a legally protected interest which must have been injured in fact; 2) a causal nexus between the injury and the complained of conduct; and, 3) a likelihood, as opposed to mere speculation, that the injury will be redressed by a favorable decision. ***Cities Service Company v. Gulf Oil Corporation,*** 1999 OK 16, 976 P.2d 545 (Okla. 1999). Petitioners have no legally protected interest at stake and most importantly, no likelihood exists that a favorable decision will be issued to redress any perceived injury. Therefore, the Petitioners lack standing to assert the tribal claims. See also ***Lujan v. Defenders of Wildlife,*** 504 U.S. 555 (1992) ("Standing is particularly difficult to show here, since third parties, rather than respondents, are the object of the Government action or inaction to which respondents object.")

II. THE WRIT MUST BE DENIED BECAUSE THE OKLAHOMA HOUSING AUTHORITIES ACT DOES NOT INFRINGE ON THE TRIBE'S RIGHT TO SELF-GOVERN

Petitioners have alleged that the Oklahoma Housing Authorities Act, specifically 63 O.S. § 1057, infringes on the Kiowa Tribe's right to self-govern and therefore the requested writ should issue. Notwithstanding that this argument was not seriously advanced in the lower court and therefore not addressed by the Oklahoma Supreme Court, Petitioners' argument exhibits a fundamental misunderstanding and therefore misapplication of the infringement doctrine.

"Infringement" is defined as "a trespass or encroachment upon". Black's Law Dictionary, Revised 4th Edition, p. 920. It has been a long-standing practice of this honorable Court to use the principle of infringement to protect Indian tribes from unlawful encroachment by state governments upon the tribe's ability to make laws and be governed by them. ***Williams v. Lee***, 358 U.S. 217, 220 (1958). This principle, known as the infringement test, protects the inherent right of Indian tribes to be self-governing. However, the cases and rationale in this area are easily distinguishable from the instant matter.

Williams v. Lee[9] as well as ***Fisher v. Dist. Court***[10] both cited for support by the Petitioners, involve disputes arising on the reservation that should have been resolved by the tribal court according to tribal laws. The conflict

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[9] 358 U.S. 217 (1958).

[10] 424 U.S. 382 (1976).

here is between two groups of tribal members, both of whom claim to be the properly appointed or elected commissioners of a housing authority voluntarily created under state law, located within the state jurisdiction, and operating its business according to state law within the state jurisdiction.[11] This dispute, therefore, arises outside of Indian country and requires a decision made pursuant to state law. This difference, though possibly seen as slight by Petitioners, is key in determining whether the infringement test is applicable.

In 1979, the Oklahoma Supreme Court recognized the state law aspect of such a determination in ***Housing Authority of the Choctaw Nation v. Craytor***, 1979 OK 100, 600 P.2d 314 (Okla. 1979). In ***Craytor***, similar to the instant case, the Oklahoma Supreme Court was required to determine which of two groups of individuals claiming to be the rightfully appointed Commissioners of the Housing Authority of the Choctaw Nation was the legally correct group. The Court held, in part, as follows:

> [I]ndeed, District Courts do have jurisdiction over the Housing Authorities, for the Authority became a public body, both corporate and politic, by virtue of the Oklahoma Housing Authority Act and by virtue of the Choctaw Nation's voluntary choosing to have a functioning Authority under the Act.

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[11] Contrary to Petitioners' assertions that KHA operates within the tribal jurisdiction, KHA currently owns 183 houses, 171 located on non-trust property and 12 located on trust property.

> The powers, duties, and responsibilities of the Housing Authority and its officers are established and defined in the Act, not by tribal law. Thus, the questions raised in the District Court are all questions which can be answered by interpreting the powers of appointment and removal established by the Act – all questions which the District Court has jurisdiction over.

Id.

Consistent with ***Craytor***, the Oklahoma Supreme Court again found that the state-created tribal housing authorities are subject to the jurisdiction of the state courts in ***Eaves v. State of Oklahoma***, 1990 OK CR 42, 795 P.2d 1060 (Okla. Crim. App. 1990). In ***Eaves***, an Osage Indian accused of murdering his father within a housing project owned by the Osage Tribal Housing Authority was tried for the murder in state court. The Osage Tribal Housing Authority is organized under the laws of the State of Oklahoma, specifically, 63 O.S. § 1057. Citing ***Craytor***, the Court held that 63 O.S. § 1057 clearly identifies tribal housing authorities as state agencies and agreed that those housing authorities are subject to the jurisdiction of the state courts.

The Tenth Circuit Court of Appeals has as well recognized the state character of Indian housing authorities formed pursuant to the Oklahoma Housing Authorities Act. In ***Housing Authority of the Kaw Tribe of Indians of Oklahoma v. City of Ponca City***, 952 F.2d 1183 (10th Cir. 1991), the Court held that because "[s]tate law grants to the Kaw Tribe the authority to establish and administer the Kaw Housing Authority", *Id.* at 1192, the Kaw Housing Authority could not assert federal constitutional

rights against another political subdivision of the State, the City of Ponca City. The Court clearly stated that political subdivisions, such as the Kaw Housing Authority, are creatures of the state, and as such are prohibited from bringing actions against fellow subdivisions. Although jurisdiction was not at issue in this case, the decision is a clear indication of the state law character of the housing authorities formed pursuant to the Oklahoma Housing Authority Act and its activities.

Another major difference between the cases cited by the Petitioners in support of the infringement argument and the instant matter is the existence of a federal statute allowing for state involvement. In ***Williams***[12], supra, there was no federal statute allowing the business owner to use the state courts for collection of his debt. Likewise, in ***Fisher***, supra, no federal statute existed to grant the plaintiff access to state court to determine the custody of an Indian child where all parties were reservation Indians. However, the State of Oklahoma, in passing the Oklahoma Housing Authorities Act, acted pursuant to a federal law, specifically the Housing Act of 1937, 42 U.S.C. § 1437 (1988). The regulations promulgated pursuant to the Act provide that an Indian housing authority may be created by ***either*** a tribal ordinance or pursuant to state law. 24 C.F.R. § 125-26 (1991). Furthermore, the

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[12] In the process of discussing the question of whether state action infringes on the affairs of reservation Indians, the Court in ***Williams*** noted that "[e]ssentially, ***absent governing Acts of Congress***, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. at 220. (emphasis added.)

current replacement statute, NAHASDA and its regulations, carry on this very same recognition and opportunity. The Oklahoma Housing Authorities Act was enacted to enable tribes to share in available federal funds through the Department of Housing and Urban Development ("HUD") to provide safe and sanitary housing for their members and no aspect of these statutes and regulations suggest a limitation on the tribal right of self-government.

It is clear that Congress, an entity with plenary power over the affairs of Indians, intended for tribes to form housing authorities under either tribal or state law. The fact that the Kiowa Tribe chose to form its housing authority under state law in 1969 exhibits a tribal action consistent with Congressional intent – not infringement of its powers of self-government. To rule otherwise would remove the ability of tribes to compact, contract or cooperate with the state or state-charted entities.

III. THE WRIT MUST BE DENIED BECAUSE CONGRESS' POLICY OF TRIBAL SELF-DETERMINATION DOES NOT PROHIBIT OR EXCLUDE HOUSING AUTHORITIES CREATED PURSUANT TO STATE LAW

Petitioners argue that Congress has adopted a policy of tribal self-determination that, by definition, prohibits state-created housing authorities. Closer scrutiny of the federal laws involved reveal, however, that state-created Indian housing authorities are acknowledged with approval in both the Housing Act of 1937 as well as the more recent federal law concerning Indian housing, the

Native American Housing Assistance and Self-Determination Act ("NAHASDA"), 25 U.S.C. § 4101 *et seq.* The Housing Act of 1937 and its regulations allowed for housing authorities created under either tribal ordinance or state law to participate in HUD programs. 24 C.F.R. §§ 805.108-.109 (1980). That recognition of the unique circumstances in Oklahoma and other states that allowed tribal housing authorities to be created pursuant to state law has been carried over to the more recent NAHASDA. In NAHASDA, "tribally designated housing entity" is defined as including those entities established by operation of State law providing specifically for housing authorities or housing entities for Indians[13]. The definitions provided in the regulations promulgated pursuant

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[13] 25 U.S.C. § 4103(21)(B)(ii) states in pertinent part as follows:

> (21) TRIBALLY DESIGNATED HOUSING ENTITY. – The terms "tribally designated housing entity" and "housing entity" have the following meaning:
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> * * *
>
> (B) OTHER ENTITIES. – With respect to any Indian tribe that, pursuant to this Act, authorizes an entity other than the tribal government to receive grant amounts and provide assistance under this Act for affordable housing for Indians, ***which entity is established*** –
>
> * * *
>
> (ii) ***by operation of State law*** providing specifically for housing authorities or housing entities for Indians, including regional housing authorities in the State of Alaska,
>
> the terms mean such entity.

(emphasis added.)

to NAHASDA define Indian Housing Authority to include state-created housing authorities as well[14].

Clearly, in reaffirming and restating its policy of tribal self-determination, it is not Congress' intent to exclude or prohibit those housing authorities in existence prior to NAHASDA and created under state law in furtherance of the Housing Act of 1937. The clear congressional intent was to include the many state-created housing authorities. Any argument to the contrary merely overlooks the clear language of the statute and regulations. It is exactly because of the principles of self-determination that tribes in Oklahoma have had and should continue to have the ability to choose whether or not to participate in the state housing authority scheme.

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[14] 24 C.F.R. § 1000.10 defines "Indian Housing Authority" as follows:

> *Indian Housing Authority (IHA)* means an entity that:
>
> (1) Is authorized to engage or assist in the development or operation of low-income housing for Indians under the 1937 Act; and
>
> (2) ***Is established:***
>
> * * *
>
> (ii) ***By operation of state law*** providing specifically for housing authorities for Indians, including regional housing authorities in the State of Alaska.

(emphasis added.)

IV. THE WRIT MUST BE DENIED BECAUSE THE OKLAHOMA HOUSING AUTHORITIES ACT DOES NOT INFRINGE ON THE KIOWA TRIBE'S DESIGNATED TRIBAL COURT

Petitioners argue that the existence of the Oklahoma Housing Authorities Act somehow infringes upon the authority of the Tribe's tribal court. Notwithstanding Petitioners' lack of standing to advance such an argument,[15] such is clearly not the case. Included in Petitioners' Appendix, p. 26, is an Order from the Court of Indian Offenses which is a clear indication of the functionality of the Tribe's designated tribal court. The Court of Indian Offenses, created by regulation of the Secretary of the Interior,[16] 25 C.F.R. § 11.100 (1996), is a court of

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[15] See Section I, supra.

[16] 25 C.F.R. § 11.100 states, in pertinent part, as follows:

Listing of Courts of Indian Offenses.

(a) Except as otherwise provided in this title, the regulations under this part are applicable to the Indian country (as defined in 18 U.S.C. § 1151) occupied by the following tribes:

* * *

(9) For the following tribes located in the former Oklahoma Territory (Oklahoma):

* * *

(xii) Kiowa Tribe of Oklahoma

(b) It is the purpose of the regulations in this part to provide adequate machinery for the administration of justice for Indian tribes in those areas of Indian country where tribes retain jurisdiction over Indians that is exclusive of state jurisdiction but where tribal courts have not been established to exercise that jurisdiction.

limited jurisdiction[17] operating pursuant to regulations and certain codes approved by the Bureau of Indian Affairs. The Order contained in Petitioners' Appendix, p.

(c) The regulations in this part shall continue to apply to tribes listed under Sec. 11.100(a) until a law and order code which includes the establishment of a court system has been adopted by the tribe in accordance with its constitution and by-laws or other governing documents, has become effective, and the Assistant Secretary – Indian Affairs or his or her designee has received a valid tribal enactment identifying the effective date of the code's implementation, and the name of the tribe has been deleted from the listing of Courts of Indian Offenses under Sec. 11.100(a).

[17] 25 C.F.R. § 11.104 states as follows:

Jurisdictional limitations.

(a) No Court of Indian Offenses may exercise any jurisdiction over a Federal or state official that it could not exercise if it were a tribal court.

(b) Unless otherwise provided by a resolution or ordinance of the tribal governing body of the tribe occupying the Indian country over which a Court of Indian Offenses has jurisdiction, no Court of Indian Offenses may adjudicate an election dispute or take jurisdiction over a suit against the tribe or adjudicate any internal tribal government dispute.

(c) The decision of the BIA on who is a tribal official is binding in a Court of Indian Offenses.

(d) The Department of the Interior will accord the same weight to decisions of a Court of Indian Offenses that it accords to decisions of a tribal court.

(e) A tribe may not be sued in a Court of Indian Offenses unless its tribal governing body explicitly waives its tribal immunity by tribal resolution or ordinance.

26, reflects the Magistrate's recognition of his limited jurisdiction and his belief that the proper forum for this dispute would have been the federal courts. Lack of jurisdiction in the Court of Indian Offenses must not be fashioned into some type of infringement for the convenience of the Petitioners.

V. THE WRIT MUST BE DENIED BECAUSE WITHOUT REGARD TO STATE LAW, TRIBAL LAW DOES NOT PERMIT PETITIONERS' APPOINTMENT AS HOUSING AUTHORITY COMMISSIONERS

Petitioners argue that all actions taken by the Chairman of the Kiowa Business Committee are consistent with tribal law[18] and that it is the state law that dictates the method of choosing commissioners for the Indian housing authority thereby causing the state law to infringe on the tribe's right to self govern. Such argument is without merit. In truth, the state law allows the choice of commissioners to be made by the "Chief or other governing head of an Indian tribe, band, or nation". 63 O.S. § 1057. The state law does not require a specific method of selecting the commissioners – that is clearly within the parameters of the authority of the tribe. The state law's only requirement is that the choice be made by

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[18] Petitioners state that the "Chairman of the Kiowa Business Committee, *acting under tribal law,* appointed Petitioners as the new KHA commissioners." Petition for Certiorari, pp. 9-10. "[T]he District Court of Caddo County voided political action *taken under tribal law . . .* " Petition for Certiorari, p. 12. " . . . *appointments legal under tribal law . . .* " Petition for Certiorari, p. 13.

the "Chief or other governing head", similar to the requirement for mayors of cities to make like appointments for city housing authorities.

The Kiowa Constitution, adopted and ratified by the Kiowa people over thirty years ago, reserves all authority to the Kiowa Indian Council[19] not expressly granted to the Kiowa Business Committee. See fn. 4. The power to appoint housing authority commissioners is not expressly granted to the Kiowa Business Committee and is therefore a power retained by the Kiowa Indian Council. The Kiowa people, in a sovereign act of self-government, chose to restrict the powers of the Kiowa Business Committee, and therefore the powers of the Chairman of the Kiowa Business Committee, by adopting and ratifying a Constitution with a balanced power structure that allowed the Kiowa Indian Council exclusive authority over the selection of housing authority commissioners. Without regard to the state law, the housing commissioners of the tribal housing authority must be selected by the Kiowa Indian Council, which has the capability to speak exclusively through the election process. The Caddo County District Court and ultimately the Oklahoma Supreme Court recognized this constitutional requirement and held that the method required by the Kiowa

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[19] In outlining the authority of the Kiowa Indian Council, Kiowa Constitution Article V, Section 1(h) states as follows:

* * *

h. All other powers not vested in the business committee by Section 2 of this Article shall be retained by the Kiowa Indian Council.

* * *

Constitution for selection of the tribal housing authority commissioners was by election.[20] Clearly, it is not "Oklahoma's exercise of judicial power" that mandates the selection process for tribal housing authority commissioners, but rather, it is the organic law of the Kiowa Tribe of Oklahoma – the Kiowa Constitution.

VI. CONCLUSION

Petitioners were appointed as commissioners of the Housing Authority of the Kiowa Tribe of Oklahoma, an entity organized and operating pursuant to the laws of the State of Oklahoma, in violation of state and tribal law. Upon notice of the illegal appointment, Respondent sought injunctive relief through the proper forum of the Caddo County District Court. Pursuant to long-standing authoritative precedent, the Caddo County District Court and the Oklahoma Supreme Court, in an unanimous decision, held that because the Kiowa Constitution clearly

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[20] Neither the Caddo County District Court or the Oklahoma Supreme Court ordered the Kiowa Tribe to actually schedule and hold an election. The Oklahoma Supreme Court clarified this point as follows:

> The trial judge did not *order* the Kiowa Tribe to conduct an election, nor could he have done so. It is, in effect, of no concern to the state courts whether an election is in fact held. The trial court merely interpreted a state statute to mean that the Kiowa Indian Council is the governing body of the tribe and declared that the proper procedure for choosing commissioners to the Kiowa Housing Authority is by election.

Housing Authority of the Kiowa Tribe of Oklahoma v. Ware, 2000 OK 60, ___ P.3d ___ (Okla. 2000).

identified the governing body of the Tribe to be the KIC, 63 O.S. § 1057 required that the housing authority commissioners be selected by the KIC through election. Petitioners' appointments therefore are invalid.

Without regard to Petitioners' lack of standing to assert tribal claims, Petitioners have failed to demonstrate how the Oklahoma Housing Authorities Act, adopted with the approval of Congress and in furtherance of federal law, specifically the 1937 Act, could infringe on the Tribe's right of self-government. To find otherwise, would, suddenly and without precedent, restrain and restrict the rights of tribes to determine for themselves when to cooperate with or compact with States and state entities. Because the Petitioners have failed to state any compelling reason in support of their flawed position, the writ must be denied.

Respectfully submitted,

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